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IN THE

Supreme Court of the United States

October Term, [redacted]

No. [redacted] 1966

ROBERT REDRUP,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
The Sale	2
Exhibits	4
SUMMARY OF ARGUMENT	4
POINT I—The books sold by petitioner were obscene	5
POINT II—The proof established petitioner's knowledge of the contents of the books he sold	6
POINT III—The prosecution in an obscenity case is not required to introduce evidence of and prove contemporary community standards	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

Jacobellis v. Ohio, 378 U. S. 184 (1964)	6, 8
Manual Enterprises, Inc. v. Day, 370 U. S. 478 (1962)	6, 9
Roth v. United States, 354 U. S. 476 (1957)	5
Smith v. California, 361 U. S. 147 (1959)	6, 10

Statute:

New York Penal Law:	
Section 1141	2

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Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department, to review a judgment of that court rendered December 17, 1964, affirming a judgment of the Criminal Court of the State of New York,

County of New York, of July 28, 1964, convicting petitioner of the sale of obscene books [New York Penal Law §1141]. Sentence was suspended (37).* Leave to appeal to the New York Court of Appeals was denied by a judge of that court [FULD, J.] on January 4, 1965.

Questions Presented

1. Whether the petitioner, having received a suspended sentence for selling obscene books, was deprived of life, liberty or property without due process of law, because the prosecution at trial failed to introduce evidence of contemporary community standards.

2. Whether the books sold by petitioner were obscene.

3. Whether the proof established petitioner's knowledge of the contents of the books he sold.

Statement of the Case

The Sale

On April 10, 1964, at about 5:50 p.m., the arresting officer approached the news-stand at 263 West 42nd Street, which is on the street level of the subway arcade, and saw displayed on a bookrack the books "Lust Pool" and "Shame Agent" (10; Peo. Exhs. 1 and 2). The officer pointed to the bookrack and said, "'Lust Pool and Shame Agent'" whereupon the petitioner, who was the clerk,

* References, unless otherwise noted, are to the pages of the record on appeal.

removed the books and put them on the counter (10). After some discussion about price, the officer paid petitioner $1.65 for both books, and the petitioner placed the books in a paper bag and handed them to the officer (11). The officer then identified himself, and exhibited a search warrant for the premises (12).

The petitioner stated to the officer that he had worked there about two years, alternating between the newsstand and the downstairs bookstore. When asked why he sold this "garbage," he replied:

> " 'There is worse stuff than that around * * * I think these books here are worse,' and he was referring to girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black-and-white" (13).

Testifying in his own behalf, petitioner stated that he had been employed for two years by the owner of the bookstore and newsstand. He usually worked downstairs in the bookstore, and had worked at the newsstand only for one hour on one prior occasion (17-8). He did not recollect saying anything to the officer about other books being worse than those involved in this case (18-9); nor did he say anything about the girlie magazines (20).

On cross-examination, petitioner acknowledged that it was for only the past eight months that he had worked in the bookstore. For the first sixteen months of his employment he had worked at the newsstand where he was arrested (20-1).

Exhibits

"Shame Agent" and "Lust Pool," People's Exhibits 1 and 2 respectively, are two soft covered books each containing 190 printed pages. Each book consists of a detailed narrative by the male protagonist of his sexual encounters with a number of females. Lesbianism, sadism, voyeurism and sodomy are also present.

Summary of Argument

The two books sold by petitioner to a police officer were clearly obscene. Totally devoid of any redeeming social value and appealing solely to prurient interest, both books consist of little more than a detailed, explicit, lengthy description of numerous and various sexual acts engaged in by the characters. Petitioner's knowledge of this content is readily inferred from his statement to the officer upon his arrest. Sale, obscenity and *scienter* having thus been established, no more need be proved to sustain the conviction. The Constitution imposes no burden upon the prosecution to prove what the community's standards are. Indeed, for this Court to do so, would result in a diminution of the Court's own role in independently assessing the validity of obscenity convictions.

POINT I

The books sold by petitioner were obscene.

Petitioner contends that as "a matter of constitutional judgment, the books herein involved are not * * * obscene. The writings clearly do not go beyond the customary limits of expression in language or theme found in many of the 'best sellers' in the literary world and other media of communication. Neither in language nor in theme do the books herein approach the candor of discussion, the explicitness of language that is found in workings of noted authors generally accepted and widely read by the public" (petitioner's brief, p. 23). If by "explicitness of language" petitioner means that neither book contains the so-called "four-letter" words, he is accurate. And if by "theme" he means that no book can be suppressed simply because it deals with sex, he is also correct. But neither statement tells us very much about the exhibits in the case at bar, or about the applicable law.

Reference, of course, must be made to the books themselves. It need merely be noted at this point that each book is narrated by a male protagonist who does little more than graphically describe in seemingly endless detail his sexual encounters—both natural and perverse—with numerous females, including in at least one instance, two females at the same time. Unquestionably, a reading of both books would demonstrate beyond doubt that "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" [*Roth* v. *United States*, 354 U. S. 476, 489 (1957)]. They go "substantially beyond customary

limits of candor in description or representation of such matters" and are "utterly without redeeming social importance" [*id.* at 484, 487, n. 20; see also, *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482-8 (1962)]. Without presuming to offer a literary critique of the works, it must be noted that their pages are bare of any material that could fairly be deemed "advocacy of ideas" or of "scientific value." Apart from the fact that the English language is used to tell a story of sorts, the art of prose composition is so rudimentary that, on their face, the books serve no literary purpose [see *Jacobellis* v. *Ohio,* 378 U. S. 184, 191 (1964)].

POINT II

The proof established petitioner's knowledge of the contents of the books he sold.

The circumstances of the sale, the position of the petitioner, as well as his admission established the element of *scienter.* Indeed, his admission alone proved *scienter.* In *Smith* v. *California,* 361 U. S. 147 (1959), this Court defined *scienter* as "knowledge by * * * [defendants] of the contents of the books," and stated that circumstances might warrant the inference that the seller was aware of the contents of a book despite his denial of knowledge. Here, of course, petitioner's comment to the officer that "[T]here is worse stuff around" and his reference to other material being sold at the same time and place, could not have been made unless he knew the contents of what he had just sold the officer. His opinion as to the relative salaciousness of various books and magazines, though not binding on the trial court, was thus significant in that it revealed a knowledge of the contents of each, a fact necessary to make such a comparison.

POINT III

The prosecution in an obscenity case is not required to introduce evidence of and prove contemporary community standards.

Petitioner asserts that the constitution imposes a burden upon the state in an obscenity trial, to prove by means of independent evidence, what constitutes contemporary community standards. Absent such evidence in the record, it is argued, the prosecution must inevitably fail, since the "burden of proving in any obscenity prosecution the limits of candor in the Nation as a whole rests upon the prosecution as a requirement of due process" (petitioner's brief, p. 11).

This issue is not properly before this Court. Although petitioner, upon conclusion of the People's case, urged it as one of three grounds for dismissal of the information—the other two being the remaining issues raised in the petition—he did not argue this particular point in his brief in the appeal before the Appellate Term of the New York Supreme Court. Only two points were urged in that brief: the books were not obscene and there was no proof of *scienter*. But petitioner did prepare a brief in support of his application to Judge FULD for leave to appeal to the New York Court of Appeals, in which he added the point now being urged upon this Court. Clearly, this is insufficient to have preserved the issue for this Court, since the Appellate Term—the only appellate court to have considered the case—never passed upon it. Nor, for that matter, did the certificate denying leave to appeal indicate that the issue had been raised and decided.

In any event, though petitioner cites many cases in making the argument to this Court, none stands for the proposition advanced. If anything, the opinion of the Court in *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964), relied upon so heavily by petitioner, indicates otherwise. In that case, the Court explicitly reaffirmed the view that "the constitutional status of an obscene work must be determined on the basis of a national standard" (*id.* at 195), and rejected the argument that the Court is limited to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with the court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a difficult, recurring and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth* v. *United States, supra,* 354 U. S. at 497-498. Such an issue, we think, must ultimately be decided by this court (pp. 187-8).
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> "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights denied from the

> First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected" (p. 190).

In effect, it is the role of this Court which renders unnecessary formal evidentiary proof in the trial court of what the national standards are. If such proof were required this Court would truly be reduced to a mere review of the "sufficiency" of the evidence, since the Court would then simply be determining whether there was some evidence in the trial record proving *a* national standard, and whether there was some evidence that the work in question fell below that particular "national" standard. Thus, if the issue were one to be conclusively "proved" at trial this Court could hardly be expected to render its own judgment, having been bound by the "proof" at trial. Clearly, however, the Supreme Court in reviewing a judgment of conviction for obscenity, is applying what it deems to be contemporary community standards. Yet, there is no indication that this Court requires proof before it of what those standards are. Since the trial court was similarly obligated to render an independent judgment, there appears no reason why it alone should be required to demand such proof. The task of trial and appellate courts in this area is to *apply* contemporary community standards to the facts, not necessarily to *record* them in every case by means of independent proof. In the instant case, the facts are the books themselves [see *Manual Enterprises, Inc.* v. Day, 370 U. S. 478, 487-8 (1962)], and to these books the court below applied contemporary standards.

While it may perhaps be permissible for the prosecution or defense to aid the trial court or even this Court, in ascertaining what is offensive to contemporary thought [see *South* v. *California*, 361 U. S. 147, 164-7 (1959) (FRANKFURTER, J., concurring)], neither Constitution nor case law compels the prosecution to do so. There is certainly even less necessity to do so if as at least one member of this Court has indicated, we know what is obscene when we see it [*Jacobellis* v. *Ohio*, *supra* (STEWART, J., concurring)].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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